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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-658

ASARCO INCORPORATED (formerly The American Smelting and Refining Company), *Appellant,*

v.

MONTANA DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, *Appellee.*

On Appeal from the Supreme Court of Montana

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of the State of Montana is reported as *Montana Department of Revenue* v. *American Smelting & Refining Company,* 567 P.2d 901 (Mont. 1977). Included as Appendix A are copies of that opinion, the Supreme Court of Montana's denial of a petition for rehearing, and the unreported findings of fact and opinions of the District Court for the First Judicial District of the State of Montana (the "State District Court") and the State Tax Appeals Board of the State of Montana (the "State Tax Board").

JURISDICTION

This proceeding involves the application of Montana's corporate license tax to income earned from sources outside Montana by Appellant and six of its subsidiaries. As described more fully below, the State Tax Board and the State District Court sustained Appellant's position, but were reversed on appeal by the Montana Supreme Court which denied Appellant's petition for rehearing in an order filed on August 11, 1977 (App. A, p. 18a).[1] Included as Appendix B is a copy of the judgment against Appellant which was entered by the State District Court on August 18, 1977 in conformity with the decision of the Montana Supreme Court. Included as Appendix C are copies of the notice of appeal which Appellant filed in the State District Court on October 5, 1977, and the notice of appeal which Appellant filed in the Montana Supreme Court on October 6, 1977.

For the reasons discussed at pp. 8-10 below, this Court has jurisdiction of this appeal under 28 U.S.C. Section 1257(2); *Street* v. *New York,* 394 U.S. 576, 581-585 (1969); and *Williams* v. *Georgia,* 349 U.S. 375, 382-383, 389 (1955).

STATUTE AND REGULATIONS INVOLVED

Section 84-1503 of the Revised Codes of Montana (the "RCM") as in effect for the years 1967 through 1970 (1933 Mont. Laws Ch. 166, § 3, as amended by 1957 Mont. Laws Ch. 219, § 1) and Chapter 10 of the

[1] The pages of the eight appendices to this statement have been separately bound and consecutively numbered. References to a particular appendix will be followed by a page number indicating the location of the cited material in the appendices as a whole.

Regulations of the Department of Revenue of the State of Montana are set forth in Appendix D hereto.

QUESTIONS PRESENTED

(1) Whether the State of Montana may lawfully impose a tax pursuant to an audit conducted by agents of the Multistate Tax Commission acting under the purported authority of the Multistate Tax Compact, the consitutionality of which is now at issue in this Court in *United States Steel Corp.* v. *Multistate Tax Commission,* Dkt. No. 76-635, prob. juris. noted, 429 U.S. 1088 (1977).

(2) Whether the State of Montana may, consistently with the Commerce Clause of Article I, Section 8 of the Constitution of the United States and the Due Process Clause of the 14th Amendment to the Constitution, subject a corporation which is doing business in Montana, but is domiciled elsewhere, to a license tax on investment income of the corporation which is earned outside Montana and has no connection with the business conducted in Montana.

(3) Whether, consistently with the above-cited provisions of the Constitution of the United States, the State of Montana may impose a license tax which has the practical effect of subjecting a corporation doing business in Montana to tax on the income of its United States and foreign subsidiaries where the subsidiaries admittedly conduct no business in Montana and derive all of their income from sources outside Montana.

STATEMENT OF THE CASE

ASARCO Incorporated, the Appellant in this proceeding, is a corporation organized and existing under

the laws of New Jersey. It has its headquarters or "commercial domicile" in the State of New York, and is qualified to do business in Montana. Appellant is engaged in the business of mining, smelting, refining, manufacturing, buying and selling nonferrous metals and other minerals. In addition, Appellant derives income in the form of dividends, interest, rents, patent royalties, mine royalties, and gains from the sale of stock and other assets. Appellant has a number of wholly-owned domestic and foreign subsidiaries including Federated Metals Canada Limited, Asarco Mercantile Company, Enthone, Incorporated, International Metal Company, Lone Star Lead Construction Corp., and Northern Peru Mining Corporation. None of the named subsidiaries conducts any business or derives any income in or related to the State of Montana. (App. A, pp. 2a, 20a-22a, 24a).

Appellant owns and operates a lead smelter in East Helena, Montana, where it receives and refines lead ores and concentrates from its own mines and those of unrelated suppliers. The partially refined metal is shipped outside of Montana for further processing and sale. Appellant also owns certain active and inactive mining properties in Montana. Appellant sells by-products of its smelter operation in Montana and also has a small number of sales in Montana from unrelated operations. (App. A, pp. 3a, 22a).

In filing its Montana corporation license tax returns for 1967-1970, the years at issue herein, Appellant apportioned its *operating* business income between sources within and without Montana on the basis of a three-factor formula prescribed pursuant to RCM Section 84-1503, which attributed to Montana that fraction of Appellant's total business income which was the aver-

age of the fractions of Appellant's total tangible property, payroll, and sales attributable to Montana. Appellant believed that its *investment* income from mine royalties, patents, copyrights, rents, interest, dividends and gains from sales of assets, to the extent derived from sources outside Montana, was not subject to apportionment and was therefore not taxable in Montana under RCM Section 84-1503. Accordingly, instead of apportioning its investment income among Montana and the other states, Appellant allocated each item of such income to a particular state. All income from securities deposited with Montana State agencies and from money on deposit in Montana was allocated to Montana. All of Appellant's remaining dividend and interest income, together with all of its patent and copyright royalty income, was allocated to New York, the state of Appellant's commercial domicile. Finally, Appellant allocated rents and royalties from real property to the state in which such property was situated, and it allocated gains from the sale of tangible property to the states where the sales occurred. (App. A, pp. 3a-5a, 22a-23a).

An audit of Appellant's returns was conducted by agents of the Multistate Tax Commission. (App. A, pp. 2a, 22a). Based on that audit, the Department of Revenue of the State of Montana (referred to hereinafter as the "Department" or "Appellee") determined that *all* of Appellant's income was "business" income within the meaning of Mont. Dept. of Revenue Regulation 1001. Accordingly, the Department determined that *all* of such income had to be apportioned under the three-factor formula instead of being allocated to specific sources. (App. A, pp. 6a, 23a). By apportioning all of Appellant's out-of-state investment income, the Department arrived at a figure for Montana taxable

income which was eleven times greater than the Montana income reported by Appellant. See Brief of the Department in the Montana Supreme Court, pp. 11-12, reproduced in Appendix E hereto, pp. 60a-61a. Appellant protested the resulting proposed deficiencies and requested a hearing before the Department. (App. F, p. 64a).

In its protest to the Department, Appellant asserted that:

(1) "the proposed deficiency assessments . . . are based upon audits, studies, formulae and factors adopted by the Multistate Tax Commission, which said Multistate Tax Compact is void and illegal by reason of conflict with Article I, Section 10, Clause 3 of the Constitution of the United States" (App. F, p. 66a);

(2) "the proposed deficiency assessment . . . constitutes an illegal and unlawful attempt to impose corporation license tax upon income having no relationship to the Montana activities or the value of the privilege of doing business in Montana of and by this Taxpayer and has no reasonable relationship to corporate activities within the State of Montana conducted by Taxpayer; and constitutes an illegal and unlawful attempt to impose a corporation license tax upon income from interest, dividends, royalties, rentals and the sale of capital assets not arising from transactions or activities in the regular course of Taxpayer's trade or business or the corporate activities of Taxpayer within the State of Montana" (App. F, pp. 65a-66a);

(3) "not only has there been an attempt to allocate unitary income, but also income of a dual or multiform nature and upon a basis which does not recognize the actual activities in furtherance of the business of the Taxpayer" (App. F, p. 69a); and

(4) "the illegal and unlawful attempt by the Corporation Tax Bureau to apportion to the State of Montana income as aforesaid constitutes an illegal and unlawful burden upon interstate commerce" (App. F, p. 69a).

A hearing was held before the Department, an agreed statement of facts was entered into the record, and certain exhibits and testimony were introduced. The Department concluded that Appellant had underpaid its license tax for the years 1967-1970. On appeal, both the State Tax Board and the State District Court held in favor of Appellant on the ground that the Department's tax assessments were not authorized by statute. Accordingly, the issues relating to the constitutionality of the statute as applied to Appellant, although contained in its protest and made a part of the record, were not reached by either the State Tax Board or the State District Court. Following its defeat in the State District Court, the Department appealed to the Supreme Court of Montana which reversed the State District Court on statutory grounds. (App. A, pp. 1a-17a).

In a timely petition for rehearing, the relevant portion of which is reproduced in Appendix G, Appellant requested the Supreme Court of Montana to consider the substantial federal constitutional questions which had been raised by Appellant in its original protest, but had not been considered by the State Tax Board or the District Court because judgment had been rendered for Appellant on statutory grounds. The Department resisted the petition for rehearing primarily on the procedural ground that the constitutional issues had not previously been briefed or argued, but also on the substantive ground that Appellant's constitutional con-

tentions lacked merit. A copy of the relevant portions of the Department's response is reproduced in Appendix H. The Montana Supreme Court denied the petition "for the reasons stated in . . . [the Department's] objections to respondent's petition for rehearing." (App. A, p. 18a).

This appeal followed in due course.

REASONS FOR NOTING JURISDICTION

The constitutional issues in this case are properly before this Court, and they involve substantial federal questions.

(1) *Jurisdictional Status:* Appellant raised the constitutional issues in this case at the earliest possible opportunity by including them in the formal protest which Appellant filed with the Department. Because the State Tax Board and the State District Court both proceeded to rule in Appellant's favor on statutory grounds, it was unnecessary, and would have been improper under Montana practice, for either the Board or the District Court to consider the constitutional issues. See *State ex rel. Hammond* v. *Hager,* 160 Mont. 391, 503 P.2d 52, 57 (1972). When the Montana Supreme Court reversed and upheld the Department's statutory contentions, Appellant promptly and unequivocally requested the State Supreme Court to give consideration to those reserved constitutional issues. (See App. G, pp. 71a-77a).

The fact that this request was made in a petition for rehearing, rather than in the original briefs in the State Supreme Court, is clearly not material. The Montana rule is that a constitutional issue which is potentially decisive may be raised at *any* time and *must* be

considered by the State Supreme Court *whenever* raised. See *In re Clark's Estate,* 105 Mont. 401, 74 P.2d 401, 114 A.L.R. 496 (1937), where the Montana Supreme Court held that "a constitutional question . . . may be raised for the first time in this court" and "[w]henever that question is presented and urged" it *"must be decided"* because any other course would constitute "avoiding the performance of a duty." 74 P.2d at 406 (emphasis supplied).[2]

Because the Montana Supreme Court has a self-imposed "duty" to consider the merits of a constitutional argument regardless of when it is raised, that Court's rejection of Appellant's petition for rehearing in the present case *must* be viewed as a rejection of Appellant's constitutional arguments on substantive rather than procedural grounds. The constitutional issues are, therefore, properly before this Court. Cf. *Street* v. *New York,* 394 U.S. 576, 581-585 (1969); *Williams* v. *Georgia,* 349 U.S. 375, 382-383, 389 (1955).

In state tax cases of this type, this Court is generally the *only* federal court which has jurisdiction to review the state court's determination. See *Tully* v. *Griffin, Inc.,* 429 U.S. 68 (1976). Accordingly, a taxpayer will ordinarily be left with no remedy at all if this Court declines on jurisdictional grounds to hear appeals of cases like the present one where the state

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[2] The Department's assertion below (App. H, pp. 78a-80a) that new issues may not be raised in a petition for rehearing in the Montana Supreme Court applies only to non-constitutional issues raised by an appellant. See *Mares* v. *Mares,* 60 Mont. 36, 199 P.267 (1921). The *Mares* decision has no application whatever to *constitutional* issues raised in a petition for rehearing by an *appellee.* As shown by the subsequent decision in the *Clark* case cited in the text, issues of a constitutional nature may be raised at *any* time by *any* party, including the Montana Supreme Court itself.

court has failed to provide a clear explanation of its substantive reasons for rejecting the taxpayer's constitutional arguments. If this Court regards such cases as not ripe for review here, the appropriate course would be to note probable jurisdiction and immediately remand to the state court with a request that it clarify its position on the merits of the constitutional issues.

(2) *The Federal Questions:* This appeal involves three fundamental questions relating to the proper functioning of state income tax laws in the federal system as defined and limited by the Constitution. All three questions arise as a result of a recent movement on the part of a number of states—particularly in the West—to utilize the resources and taxing theories of the Multistate Tax Commission in order to expand the scope of the state taxing power far beyond its traditional limits in an understandable effort to raise new revenues. Compare, e.g., Dexter, Taxation of Income from Intangibles of Multistate-Multinational Corporations, 29 Vand. L. Rev. 401, 407 (1976), with Garrison, Toward A Consensus on Apportionable vs. Allocable Income, 28 Tax Exec. 41 (1975), and Peters, State Income Tax Problems of Interstate Business, 33 N.Y.U. Inst. on Fed. Tax. 899, 915 et seq. (1975).

(a) *The Role of the Multistate Tax Commission:* The audit in this case was conducted by agents of the Multistate Tax Commission (the "MTC") acting under the purported authority of the Multistate Tax Compact (App. A, pp. 2a, 22a, 41a). The constitutionality of that Compact is now at issue in *United States Steel Corp.* v. *Multistate Tax Commission, supra,* which was argued on the merits before this Court on October 11, 1977. If this Court concludes that the Compact is invalid under the Federal Constitution, a serious federal

question will arise regarding the validity of any state tax assessments resulting from audits, recommendations and arguments of MTC personnel.

The decision in the *U.S. Steel* case will clearly apply to the parties to this proceeding because Appellant is a member of the class of plaintiffs in the *U.S. Steel* case, and Montana's Commissioner to the MTC is a named defendant.

Furthermore, it is clear from the record that the MTC has played a significant role in the present case. The letter notifying Appellant of the audit adjustments stated they were "based on an audit by the Multistate Tax Commission" and, in fact, the papers containing the adjustments are headed "MULTISTATE TAX COMMISSION—INCOME TAX AUDIT—FOR STATE OF Montana". The Montana official who signed that letter testified that he worked on the audit for a short time with the MTC auditor "under his supervision and direction".[3] In both of the Montana Courts, the Department was represented by Mr. Theodore W. de Looze, an active member of MTC who was brought in from Oregon to argue the case.[4] In addition, the MTC's Chief Counsel, Mr. William D. Dexter, appeared for the MTC as amicus curiae.[5]

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[3] Transcript of Hearing Before the Department, October 1, 1973, p. 54.

[4] While the record below does not disclose Mr. de Looze's connection with the MTC, it is a matter of public record of which this Court may take judicial notice. See Eighth Annual Report, Multistate Tax Commission, for the Fiscal Year Ending June 30, 1975 at pp. xiii and 8.

[5] In the proceedings below, Appellant filed a brief in opposition to the MTC's motion for leave to participate in this proceeding as amicus curiae. Appellee has characterized a portion of Appellant's

In view of the MTC's extensive involvement in this case, the present appeal should clearly remain on this Court's docket until the Court has decided the *U.S. Steel* case and the impact of that decision can be determined.

(b) *Taxation of Out-of-State Investment Income:* There is a well-established distinction between the powers of domiciliary and nondomiciliary states to tax corporate investment income. The state in which a corporation is domiciled may tax all of its investment income regardless of source. See, e.g. *Chestnut Securities Co.* v. *Oklahoma Tax Commissioner,* 125 F.2d 571 (10th Cir.), *cert. denied,* 316 U.S. 668 (1942). However, a nondomiciliary state is not permitted to tax *any* income of an out-of-state corporation unless that income is "properly apportioned to local activities within the taxing State." *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, 452 (1959). It is not claimed that Montana was Appellant's domicile. Accordingly, Montana may tax Appellant's income only to the extent that it is fairly attributable to Appellant's business within Montana. It should be emphasized that the issue here is not whether the mechanical formula applied by Montana provides a sufficiently accurate approximation of Appellant's *operating* income from Montana; Appellant itself used the three-factor formula in apportioning its total operating income between Montana and other sources. The issue

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legal argument in that brief as an admission by Appellant that MTC participation was irrelevant. (See App. H, pp. 80a-81a). What Appellee has overlooked is that the Court below *granted* MTC's motion to participate in this case, necessarily rejecting Appellant's contrary argument. The plain fact of the matter is that MTC personnel have controlled this case from the outset.

is whether Montana may apportion to itself a fraction of Appellant's *investment* income which was demonstrably derived from sources outside the State and was severable from Appellant's in-State operations.

The passive income which Appellee sought to apportion to Montana included income from intangible assets, including dividends, interest, and patent and copyright royalties; income from the sale or exchange of stock and other intangible assets; and rents and royalties from real property. With minor exceptions this income was earned and received, and the related assets were issued, held, and sold entirely outside Montana. In its tax returns, Appellant allocated entirely to Montana the income from funds and securities actually on deposit in Montana. The remaining income (hereinafter referred to for convenience as the "Investment Income") was allocated to other states. The State Tax Board and the State District Court each found as a fact that all of Appellant's Investment Income was derived from sources outside of Montana and could be "segregated" from Montana. (App. A, pp. 23a, 43a). These factual findings were not questioned in any way by the Montana Supreme Court. However, that Court held that part of each item of Appellant's Investment Income could be apportioned to Montana "without regard to [its] source". (App. A, p. 9a).

The effect of apportioning the out-of-state Investment Income was to increase dramatically the amount of Appellant's total income which Montana apportioned to itself, from a four-year total of $588,456 (as reported by Appellant) to $6,472,776 (computed without the effect of combined reporting). See App. E, pp. 60a-61a.

This gross disparity—representing an eleven-fold increase in Appellant's tax liability—is clear proof that the Montana statute as applied by the State Supreme Court "operates so as to reach profits which are in no just sense attributable to transactions within its jurisdiction". *Hans Rees' Sons, Inc.* v. *North Carolina ex rel. Maxwell,* 283 U.S. 123, 134 (1931).

It is well established that a statute which is theoretically fair on its face becomes unconstitutional if the statute as actually applied has the practical effect of taxing income or property which the state may not constitutionally reach. *American Oil Co.* v. *Neill,* 380 U.S. 451, 458 (1965); *Hans Rees' Sons, Inc.* v. *North Carolina ex rel. Maxwell, supra.* The present case involves statutory provisions which are perfectly reasonable on their face; as amplified by the regulations, they call for apportionment of "business" income among the states where the taxpayer does business, and specific allocation of the taxpayer's remaining income to the particular states where the income was earned. (See App. D, pp. 51a-58a). The problem arises because the Multistate Tax Commission auditors, the Department and the State Supreme Court labeled Appellant's passive Investment Income as "business" income in order to bring it under the apportionment provisions. If sustained, this action would have the practical effect of imposing Montana tax on part of the Investment Income, even though *all* of that Income was earned from sources *outside* Montana. In short, the tax would reach "extraterritorial values", which is a result not permitted by the Constitution. *Butler Bros.* v. *McColgan,* 315 U.S. 501, 507 (1942). See also *Connecticut General Life Insurance Co.* v. *Johnson,* 303 U.S. 77, 80-81 (1938), holding that "the due

process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere" and *Norfolk & Western Ry. Co.* v. *Missouri State Tax Commission,* 390 U.S. 317, 325 (1968), holding that "A State will not be permitted, under the shelter of an imprecise allocation formula or by ignoring the pecularities of a given enterprise, to 'project the taxing power of the state plainly beyond its borders.'"

It is no answer to the jurisdictional argument to say, as the State Supreme Court tried to do (App. A, pp. 11a-13a), that out-of-state investments may contribute in some vague or indirect manner to the earning of in-state operating income. Even if this were so, and the connection were direct and substantial enough to sustain an assertion of jurisdiction, this argument at best would support an allocation of income *away* from the state of operations to the investment situs, on the ground that the operating income was earned in part by the investment assets. On the other hand, all functions necessary to earn the Appellant's passive income—the holding and management of the investments—were performed outside Montana. *No* contribution was made by Appellant's Montana operations to these functions, unless it be contended that some of the invested funds were originally derived from those operations. It is inconceivable, however, that Montana could reach out to tax the investment income on funds originally earned *and already taxed* in the State, but subsequently removed and invested *elsewhere.* Similarly, the fact that such income might later be brought into and benefit in-State operations provides no support for a *present* tax on that income. Such income is clearly within the taxing jurisdiction of the state in which it is derived, and to permit another nondomi-

ciliary state to tax it as well would foster multiple taxation in contravention of due process requirements. It would also burden interstate commerce to an impermissible degree. *People ex rel. Alpha Portland Cement Co.* v. *Knapp,* 230 N.Y. 48, 129 N.E. 202 (1920) per Cardozo, J. See *Square D Co.* v. *Kentucky Board of Tax Appeals,* 415 S.W. 2d 594 (Ky. 1967); *F. W. Woolworth Co.* v. *Director of Division of Taxation,* 45 N.J. 466, 213 A.2d 1 (1965); *Gulf Oil Corp.* v. *Clayton,* 267 N.C. 15, 147 S.E. 2d 522 (1966); *American Bakeries Co.* v. *Johnson,* 259 N.C. 419, 131 S.E. 2d 1 (1963); *Commonwealth* v. *ACF Industries, Inc.,* 441 Pa. 129, 271 A.2d 273 (1970). See also *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U.S. 434, 439-440 (1939).

As indicated by the cited cases, a number of state courts have held that the Constitution prevents the states from taxing out-of-state investment income earned by corporations doing business within the state. However, because this Court has not yet spoken out on the issue, the Court below apparently felt that it was free to reach a different result. The decision below is erroneous, and because it conflicts with other state court decisions on an important constitutional issue, this Court should step in to resolve the conflict. As matters now stand, the decision below is a clear inducement to other states to expand their own taxing systems beyond permissible constitutional limits.

(c) *Taxation of the Income of Out-of-State Subsidiaries:* The Department determined and the State Supreme Court held that Appellant's Montana tax liability should be computed by applying the three-factor apportionment fraction to the combined income of Appellant and six of its United States and foreign

subsidiaries. This combined calculation presents the same important federal question which is now before this Court in *Chase Brass & Copper Co.* v. *Franchise Tax Board,* 70 Cal. App. 3d 547, 138 Cal. Rep. 901 (1977) (U.S. Sup. Ct. Dkt. No. 77-582). Simply stated, the question is whether a state may impose an indirect tax on the income of companies beyond its jurisdiction, by "combining" them with affiliated companies over which it does have jurisdiction. It is Appellant's position that such an imposition constitutes both an impermissible burden on interstate and foreign commerce and a denial of due process of law.

It is undisputed that the six subsidiaries in question had insufficient contacts with Montana to be subject to its taxing jurisdiction. See Brief of the Department in the Montana Supreme Court, at pp. 48-49, reproduced in App. E, p. 62a. No contention has been raised that Appellant understated its Montana income, or its business income, by failing to deal at arm's length with these companies. The Department did not invoke the provisions of § 84-1508, RCM, which provides explicit authority to adjust distortions in separate income arising as a result of affiliation. The combined subsidiaries had no direct or indirect dealings with Appellant's Montana operations. Finally, the State District Court found that Appellant's income could be determined without reference to the income of the combined subsidiaries (App. A, p. 24a), and this finding was not overturned by the Montana Supreme Court.

On this record, there is no justification for the State Supreme Court's conclusion that combined reporting was a proper method of determining *Appellant's* Montana income. A parent and its wholly-owned subsidiary

are separate taxable entities for federal tax purposes. *National Carbide Corp.* v. *Commissioner,* 336 U.S. 422 (1949); *Interstate Transit Lines* v. *Commissioner,* 319 U.S. 590 (1943). They are no less so for state tax purposes. To the extent combined reporting produces an increase in Montana's definition of taxable "income", Appellant is not in fact being taxed on the income of its Montana operations but rather on an arbitrarily assigned amount of its subsidiaries' income. *Square D Co.* v. *Kentucky Board of Tax Appeals, supra; Gulf Oil Corp.* v. *Clayton, supra; Universal Manufacturing Corp.* v. *Brady,* 320 So.2d 784 (Miss. 1975). Thus, Montana is levying an indirect tax on that which it could not constitutionally tax directly, and using its personal jurisdiction over Appellant's Montana operations to collect a tax which is in fact levied on income from other operations which are constitutionally beyond reach. This Court very recently reiterated the principle that it is the economic effect of a tax rather than nomenclature which determines its validity. *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274 (1977). See also *American Oil Co.* v. *Neill, supra,* 380 U.S. at 455. For two of the years in issue, the economic effect of the Montana tax as applied to Appellant is clearly to tax "extraterritorial values". *Butler Bros.* v. *McColgan, supra,* 315 U.S. at 507.[6]

Because combined reporting is becoming a pervasive practice, and is being vigorously promoted by the

[6] Because the combination of Appellant with its subsidiaries would not produce an increased taxable income for the years 1967 and 1970, it would have no unconstitutional effect in those years. See App. E, pp. 60a-61a.

MTC,[7] it is important for this Court to exercise its jurisdiction to determine whether the practice is valid, and, if so, the extent to which it may be used. The *Chase Brass* case and the present case provide an appropriate opportunity for this Court to examine the problem in two different, but representative, factual contexts.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and either remand to the Montana Supreme Court for elaboration of its views on the merits of Appellant's constitutional arguments, or schedule the case for plenary consideration by this Court.

Respectfully submitted,

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[7] See, e.g., *Coca Cola Company* v. *Department of Revenue,* 271 Ore. 517, 533 P.2d 788 (1975), which was argued by the same counsel who appeared for the Department in the present case. See also Garrison, Toward A Consensus on Apportionable vs. Allocable Income, 28 Tax Exec. 41 (1975).